Brief of Walter F. Smith, for
Supreme Court of the United States.
Filed Mar. 28, 1898.

October Term, 1897.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF DETROIT, AND THE DETROIT RAILWAY.

No. 236.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief for the Plaintiff in Error.

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Forum Print, 74 William St., N. Y.

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BRIEF,
for the Plaintiff in Error.

Statement.

(The references are to the printed pages of the record.)

The plaintiff in error is a street railway company of the State of Michigan, organized for the purpose of owning and operating lines in the city of Detroit, and is the successor in interest of a similar corporation named the Detroit City Railway. The rights asserted by it arise from an ordinance of the Common Council of that city passed upon November 24, 1862. This provided that the Detroit City Railway was "exclusively "authorized to construct and operate railways as herein "provided, on and through" (certain specified streets) "and "through such other streets and avenues in said city as may "from time to time be fixed and determined by vote of the "Common Council of the said city of Detroit, and assented to "in writing by said corporation. * * And provided the

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"corporation does not assent in writing, within thirty days "after the passage of said resolution of the Council, ordering "the formation of new routes, then the Common Council "may give the privilege to any other company to build such "route" (p. 12).

The ordinance provided also, that "the powers and "privileges conferred by the provisions of this ordinance "shall be limited to thirty years from and after the date of "its passage" (Sec. 20, p. 15). By an ordinance passed November 14, 1879 (Sec. 5, p. 20), it was provided further that "the powers and privileges conferred and obli- "gations imposed on the Detroit City Railway Company by "the ordinance passed November 24, 1862, and the amend- "ments thereto are hereby extended and limited to thirty "years from this date." Although there is high authority for the principle that perpetual grants of this character are lawful (People *vs.* O'Brien, 111 N. Y., 1, 40; People *ex rel.* Woodhaven Gas Co. *vs.* Deehan, 153 N. Y., 528), no question of the sort is now involved. By the latter ordinance the rights of the plaintiff in error were, in any event, extended until October 14, 1909. Indeed, this has been already adjudged in a suit between the City and the plaintiff in error (Rec., pp. 3, 4; 64 Fed. Rep., 628) to have been the effect of that ordinance. It may be added that the construction of the road was a sufficient consideration for the grant, and that the acceptance of the ordinance both fully appear in the record, and in any event would be presumed (City Railway Co. *vs.* Citizens' Railroad Co., 166 U. S., 557, 568).

On November 20, 1894, the Common Council passed an ordinance granting to several third parties the right to construct street railways upon portions of certain streets upon which the plaintiff in error was maintaining and operating street railways, and also the right to construct, maintain and operate railways on certain other streets, alleys and public places in the city of Detroit, without giving to plaintiff in error the opportunity to decide whether it would construct the same (pp. 4, 5, 34-45). The present suit was brought in the Circuit Court for the County of Wayne and State of Michigan, to enjoin the grantees named in the latter ordinance,

and also the City, from acting thereunder, upon the ground that it impaired the contract between the City and the plaintiff in error arising from the ordinances first aforesaid (p. 10). The bill was dismissed (pp. 465, 466), and, on appeal to the Supreme Court of the State, the decree of dismissal was affirmed (p. 476). From that decree the present writ of error has been duly prosecuted to this court (pp. 477–480).

It has very recently been held that, even in the absence of an expressed intention of the sort, a grant of authority to construct and operate railways in the streets includes not merely streets then existing, but also such as may exist thereafter (People *ex rel.* Woodhaven Co. *vs.* Deehan, 153 N. Y., 528). The language of the ordinance of November 24, 1862, however, leaves no room for doubt upon that subject. So far as any streets were thereafter fixed and determined by vote of the Council as a new street railway route, the exclusive right was given to the grantee to construct and operate the railways thereon, provided it agreed within thirty days "to build such route"; only in case it failed to so agree could "the Common "Council give the privilege to any other company to build such "route" (p. 12). The subsequent acts of the parties gave the same practical construction to the ordinance; for, from 1862 until 1894, it was constantly recognized that the grantees under this ordinance had the right to elect whether they would construct such new street railway routes as were from time to time fixed and determined by the Council, before the right to do so could be granted to any third party (Principal Brief for Plaintiff in Error, pp. 8-13)

The defendants have heretofore laboriously sought to raise doubts regarding the precise meaning of this ordinance, and thereupon to apply the rule that public grants are to be construed strictly against the grantee. But this is a mere waste of time. The terms of the ordinance are perfectly clear and speak for themselves. There is nothing doubtful to construe, and therefore construction is out of place.

> "Where the words of a law, treaty or contract have a "plain and obvious meaning, all construction in hostility

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" with such meaning is excluded. This is a maxim of " law and a dictate of common sense; for, were a differ- " ent rule to be admitted, no man, however cautious and " intelligent, could safely estimate the extent of his " engagements, or rest upon his own understanding of a " law until a judicial construction of those instruments " had been obtained." Green *vs.* Biddle, 8 Wheaton, 1, 90.

" Whenever invoked (the rule of strict construction), " comes attended with qualifications and other rules no " less important. It is by the light which each contrib- " utes that the judgment of the court is to be made up. " The object in construing penal as well as other statutes " is to ascertain the legislative intent. That constitutes " the law. If the language be clear, it is conclusive. " There can be no construction where there is nothing to " construe. The words must not be narrowed to the exclu- " sion of what the legislature intended to embrace, but " that intention must be gathered from the words, and " they must be such as to leave no room for a reason- " able doubt upon the subject." United States *vs.* Hartwell, 6 Wall., 385, 395, 396.

" Such (insurance) contracts are open to construc- " tion like all other contracts needing interpretation, but " are subject to it only when, upon the face of the " instrument, it appears that its meaning is doubtful or " its language ambiguous or uncertain. An elementary " writer says: 'Indeed, the very idea and purpose of " 'construction imply a previous uncertainty as to the " 'meaning of a contract, for when this is clear " 'and unambiguous there is no room for construction " 'and nothing for construction to do.' (2 Pars. on " Cont., 500.)" Dwight *vs.* Germania Ins. Co., 103 N. Y., 341, 347.

" The rule that public grants are to be construed " strictly against the grantee means simply that nothing " shall pass by implication, except it be necessary to " carry into effect the obvious intent of the grant. But " the obvious intention of the parties, when expressed in " plain language, cannot be ignored in a public any " more than in a private grant. A construction that " would lead to false consequences or unjust or incon- " venient results, not contemplated or intended, should " be avoided in a grant as well as in a statute" People *ex rel.* Woodhaven Co. *vs.* Deehan, 153 N. Y., 528, 532.

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So, too, the defendants have devoted much space to attacking the ordinance upon the ground that it constitutes an exclusive grant. The mere fact that a grant of rights in the streets of a municipality is exclusive does not render it unlawful. When a particular business has no existence save as it is authorized by law, the statute which creates it may also make it exclusive, for it has no existence save in the manner and form in which it is thus created (Cooley on Torts, 278; Tiedeman on Limitations of the Police Power, Sec. 105). "The "power of the legislature to grant to a private individual or "corporation the exclusive right to use the streets of a city "for the purpose of laying down gas pipes or other similar "conduits in the roadbed has been questioned; but it has "been held very generally that such an exclusive legislative "grant is valid, if it does not conflict with some express pro-"vision of the State constitution" (Tiedeman on Municipal Corporations, Sec. 296). This is fully settled in this court.

In New Orleans Gas Company *vs.* Louisiana Light Company, 115 U. S., 650, the Gas Company was entitled by an act of the legislature to the sole and exclusive privilege of manufacturing and distributing gas in the city by means of pipes laid in the streets. Thereafter the city attempted to grant to the Light Company the right to lay pipes in the streets for that purpose. This suit was brought by the Gas Company to enjoin the Light Company from acting under said grant. The court held that the legislative grant of the exclusive right to supply gas to the municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, was a grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee was a contract protected by the Constitution of the United States against state legislation to impair it, and that, therefore, the complainant was entitled to the relief prayed. "If the state "can, by contract, restrict the exercise of her power to "construct and maintain highways, bridges and ferries, "by granting to a particular corporation the exclusive "right to construct and operate a railroad within certain "lines and between given points, or to maintain a bridge "or operate a ferry over one of her navigable streams "within designated limits; if she may restrict the ex-

"ercise of the power of taxation by granting exemption "from taxation to particular individuals and corpora- "tions, it is difficult to perceive upon what ground we "can deny her authority—when not forbidden by her "own organic law—in consideration of money to be ex- "pended and important services to be rendered for the "promotion of the public comfort, the public health or "the public safety, to grant a franchise, to be exercised "exclusively by those who thus do for the public what "the state might undertake to perform either herself or "by subordinate municipal agencies" (p. 665).

In New Orleans Water-Works Company *vs.* Rivers, 115 U. S., 674, the court held that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, was a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, was a contract protected by the Constitution of the United States against state legislation to impair it. The same thing was held in St. Tammany Water Works *vs.* Water Works, 120 U. S., 64.

In Louisville Gas Company *vs.* Citizens' Gas Company, 115 U. S., 683, the same rules were applied to an exclusive grant of the right to supply gas.

In Plank Road Company *vs.* Railroad Company, 103 Michigan, 585, by the terms of its charter complainant was put into possession of a highway and was to retain such possession for the purpose of construction and operation of its road. The court held that there was no doubt of the power of the legislature in such a case to make the privilege exclusive.

To the same effect are Citizens' Water Co. *vs.* Bridgeport Co., 55 Connecticut; People *ex rel.* Woodhaven Co. *vs.* Deehan, 153 N. Y., 528; Atlantic City Works *vs.* City, 39 N. J. Eq., 367, 374; City of Newport *vs.* Newport Light Co., 84 Ky., 166.

If the present could properly be deemed an exclusive grant, these authorities would apply here because, as will be seen hereafter, in Michigan all grants of rights in the streets are necessarily made by the local municipalities, and not by the State.

This is not, however, really a grant of an exclusive franchise. The only serious objection urged against exclusive

grants is that the municipal authorities should not deprive themselves of the power to make additional improvements as the needs of the municipality may require, and confer upon private parties the right of decision in that regard. But this ordinance is not open to that objection. Under its terms the Council has full power to "fix and determine" any additional streets through which railways shall be constructed. The plaintiff in error has no control whatever over the question what new roads shall be built; nor has it any exclusive right to construct all such roads as shall be built. When the Council has "fixed and determined" any additional streets, the plaintiff in error has thirty days within which to determine whether it will undertake the construction of the new lines. If it concludes not to do so, the Council may give the privilege to any other company (p. 12). In either event the Council will have determined upon the improvement, the construction of the road will be equally assured and the necessities of the public will be equally served. The fact is merely that, in consideration of the construction of such roads as the Council deemed necessary in 1862, it granted for a limited time an option of thirty days during which the plaintiff in error might decide whether it would construct any additions thereto which the Council might fix and determine.

An examination of the opinion of the court below leads to the conclusion that its decision is based upon the *exclusive* character of the grant by the City to the Street Railway Company. But if the word "exclusively" were not in the ordinance, the plaintiff in error would still be entitled to the relief which it asks, because the City has violated its contract in refusing to it and granting to third parties the right to construct and operate railways through other streets and avenues fixed and determined by the Common Council. In the first instance it is not a question of *exclusive* right; it is rather a question of enjoying *the* right originally granted to the Company. The statute gives the *exclusive* right to use and operate the tracks when laid, and the rule of decision (Street Ry. Co. *vs.* West Side Co., 48 Mich., 433) prevents multiplying tracks in the streets, so that it is immaterial whether the plaintiff in error was "*exclusively* authorized," or merely "authorized" to construct and operate railways.

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There is, therefore, nothing in the objection to this ordinance as an exclusive grant, both because it does not in fact possess that character and because, if it did, that alone would not render the ordinance unlawful.

The defendants have urged still further that this is an exclusive grant only of authority to construct railroads to be operated by animal power and have cited some authorities as establishing the rule that a grant of that nature does not prevent a grant by the City of authority to construct a road to be operated by power of a different character.

But these have no application to the present case. Here the grant was of "exclusive authority to construct and operate "railways as herein provided on and through" (certain specified streets), "and through such other streets and avenues in said "city as may, from time to time, be fixed and determined" (Ordinance of Nov. 24, 1862, Sec. 2, p. 12). Then by a later section it was provided that the cars should be drawn by animal power only, at a rate not exceeding six miles per hour (Sec. 7, p. 14). It will be seen, therefore, that the right to construct railways in the streets of the City was granted generally to the grantee, and by a later provision the City saw fit to impose the limitation that cars should be drawn thereon only by animal power at a rate not exceeding six miles per hour. This was not a limitation of the right to construct railways, but merely a regulation as to the manner of their use when they should be constructed.

It was entirely competent for the City to release the grantee from this restriction. Accordingly it did so by ordinance passed January 3, 1889. This provided that permission and authority were given to the grantee "to run its cars at a rate of speed "not exceeding ten miles an hour and is hereby required to run "thereon at an average speed of not less than six miles per "hour and whenever it shall deem it advisable to substitute in "lieu of animal power, such system of electric or other motive "power, except steam, as shall seem best in its judgment, for "the purpose of properly and safely conducting its business "in said city of Detroit, upon any or all of its said lines now

" in use and operated or *hereafter* to be in use and operated " by said company " (pp. 429, 430).

This, therefore, relieved the railways then owned or thereafter to be owned by the Detroit City Railway of the regulation that they should be operated by animal power at a speed not exceeding six miles per hour. It recognized that the company's lines comprised both such as it then owned and such as it should thereafter own. As to both, it disposed of any claim that the provision of the original ordinances regulating the manner of operating the roads can now be asserted as a limitation of the grant. This was ruled exactly in City Railway Co. *vs.* Citizens' Railroad Co., 166 U. S., 557, 569.

These suggestions of the defendants are, therefore, without merit. The only question in the case is whether, after the grantees have fully carried out the terms of the grant to be performed upon their part and have undertaken the risk of constructing railway lines in what was relatively a small city, now that circumstances have somewhat changed, the grant can be repudiated upon the ground that the Council was without power to make it. No equitable ground has been or can be suggested for this course of action. Nor has it been or can it be claimed that the plaintiff in error will not fully serve the necessities of the public. So that, as just said, the contention that the Council was without power to make the grant constitutes the sole defense against complainant's right to relief.

It is submitted that this contention is without foundation, because the Council's action was authorized (1) by reason of the provisions of the constitution of the State, and (2) in any event by reason of its statutes.

Points.

FIRST.

The Council was authorized to pass the ordinance by reason of the provisions of the Constitution of the State.

In Michigan it is settled that the right of self-government is secured by the Constitution to the municipalities of the State (People *ex rel.* Le Roy *vs.* Hurlbut, 24 Mich., 44; People *ex rel.* Attorney General *vs.* Lothrop, 24 Mich., 235; People *ex rel.* Board of Commissioners *vs.* Common Council, 28 Mich., 228, 240; People *ex rel.* Attorney General *vs.* Common Council, 29 Mich., 108; Allor *vs.* Auditors, 43 Mich., 76, 98; Attorney-General *vs.* Common Council, 58 Mich., 213; Board of Police *vs.* Auditors, 68 Mich., 576; Detroit Street Railway Co. *vs.* City of Detroit, 64 Fed. Rep., 628, 637). "No busi-" ness which is in its nature municipal can be controlled by " State or any other outside authorities" (Allor *vs.* Auditors, 43 Mich., 76, 98).

The case of Gale *vs.* Kalamazoo, 23 Mich., 344, has been much relied upon by the defendants, but the facts of that case were wholly different from the present. The municipality there attempted to establish a monopoly in the business of marketing by a contract providing that there should be no markets in the city save such as should be controlled by the contractor. It was held that in the absence of express authority the city had no power to do this.

In Taylor *vs.* Street Railway Company, 80 Mich., 77, the ordinance was similar to that involved here. No question was made regarding the power of the council to pass it. The court did, indeed, say that the council could confer no greater right upon the defendant than was authorized by its charter, and proceeded to state the general rule that "municipal corporations derive their "sole source of power from legislative enactments." Counsel for defendants have laid much stress upon this, yet it is obviously without force regarding the effect of the provisions of the constitution upon the powers of the municipality.

The Constitution, therefore, provides that "the state shall " not be a party to, or interested in, any work of internal im-

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"provement, nor engaged in carrying on any such work, except "in the expenditure of grants to the state of land or other "property" (Art. XIV, Sec. 9). The streets and highways of a State constitute its greatest work of internal improvement. By reason of this constitutional provision the State could not be a party to or interested in any such work nor engaged in carrying on the same. Accordingly the Constitution contained provisions recognizing that the local authorities would be in control thereof, as follows: "There shall be "elected annually, on the first Monday of April, in each organ- "ized township * * * one commissioner of highways, "* * * and one overseer of highways for each highway "district" (Art. XI, Sec. 1). "The legislature shall "not * * * vacate nor alter any road laid out by com- "missioners of highways, or any street in any city or village, "or in any recorded town plat" (Art. IV, Sec. 23).

It is well settled that under these provisions the local authorities control the construction and use of the highways.

> In People *ex rel.* Hubbard *vs.* Township Board of Springwells, 25 Mich., 153, the legislature passed an act authorizing commissioners to be appointed by the Governor to improve Fort Street West, in the township of Springwells. These commissioners were authorized to collect tolls and the township was required to issue bonds and submit to taxation for the purposes of the improvement. The court held that the legislature had no constitutional power to pass such a statute, because the state was prohibited from becoming interested in any work of internal improvement or engaged in carrying on such work. It said "that a macadamized road is a 'work of internal "'improvement' is manifest. The shortness of the road "does not change its character. The restriction is not "against great works, but against all works of that kind, "and the case comes within the language and intent of "the prohibition. And we can only repeat what was "said in Ryerson *vs.* Utley. 16 Mich. R., 269, that 'the "'Constitution does not permit the state either to "'contract a debt for a public improvement or to expend "'in its construction anything but the grants which it "'has received for the purpose; and any legislation "'which attempts any other expenditure must be di-

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" 'rectly within the constitutional inhibition, and, there-
" fore, void' p. 275. The question whether the work
" is carried on by the state, in no way depends on the
" sources from which the money is drawn to pay for it.
" It is a state work if directed, planned and executed
" by the state agency, and while the fact that the
" money is charged on a certain locality may make the
" proceeding objectionable on independent grounds, it
" does not alter its character. * * * This street, being
" a public highway, was by law put under the charge of
" the local authorities. The constitution (Art. XI,
" Sec. 1) requires an election every year of a township
" commissioner of highways and of an overseer of high-
" ways for every highway district. Their powers were
" subject to legislative modification, but no legislation
" could abolish the offices or take away all their func-
" tions" (pp. 155, 156.)

In People *ex rel.* Park Commissioners *vs.* Common Council, 28 Mich., 228, an act was passed creating a board of park commissioners for the city of Detroit, and authorizing them to lay out parks and issue bonds. The court held the statute invalid as an unlawful interference with the right of local self-government. It held that as regards property rights and matters of exclusively local concern, the state has no right to interfere and control by compulsory legislation the action of municipal corporations; that the people of other parts of the state, through their representatives, have no more authority to dictate to the city of Detroit what fountain shall be erected at its expense for the use of its citizens or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens, than have the rest of the community to dictate to an individual what he shall eat, drink or wear.

In People *ex rel.* Maybury *vs.* Mutual Gas Co., 38 Mich., 154, the city of Detroit made a grant to a Gas Company in which it was stipulated that the grantee should not enter into any combination with, or sell out to any other gas company, and if it did so, the consent granted should cease and become null and void. The company violated this stipulation, and the state made an application for leave to file an information to deprive the company of the franchise, as it was claimed to be, of laying gas pipes in the streets. The court denied the application. It said:

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"The permission to lay these pipes does not differ "in any respect from that required for laying railways "over land, or ditches through it. It is not a state "franchise, but a mere grant of authority, which, "whether coming from private owners, or public agents, "rests in contract or license, and in nothing else. A "violation of the contract, or an unauthorized intrusion, "must be redressed as all ordinary wrongs are redressed, "by the usual legal remedies. It in no way concerns "the state whether the power is granted or withheld, "nor whether the corporation has or has not fulfilled its "agreements. The injured party has a remedy for any "grievance, but the state is no more interested than it "would be in the question whether or not a railroad "company has lawfully acquired its right of way. This "court has heretofore refused to recognize the encroach-"ment of a corporation on a highway as subject to be "reached by *quo warranto*, and we discover no better "reason for interfering in the present case" (pp. 155, 156). This was approved in People *vs.* Railway Co., 92 Mich., 522, 524, and again in Attorney-General *vs.* Railway Co., 96 Mich., 65, 68, the court saying regarding *quo warranto* proceedings by the state to test the validity of a grant to operate a street railway: "It is a matter "of local interest, in which the municipality and its people "are interested. So long as they are content, we do not "think the state is interested" (p. 69). Similarly in People *vs.* O'Brien, 111 N. Y., 1, 33, 34, 41, where the constitution provided that the legislature could not pass any private or local act empowering a corporation to lay down railroad tracks, the court expressed the view that the state had no interest in the franchise, and could not maintain an action to enforce a forfeiture thereof.

In Davies *vs.* Supervisors of Saginaw Co., 89 Mich., 295, the legislature passed an act taking certain highways out of the control of the townships, cities and villages in which they were located, and putting them in charge of a Board of County Road Commissioners created by the statute. The court held that the act was unconstitutional. It said: "This act cannot be sus-"tained.

"1. It seeks to divest certain local officers, recognized "as such and provided for by the Constitution, of the "functions of their offices, and to confer those functions

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"upon a board, appointed by a power removed from that "locality, and not responsible to local authority.

"The functions of township officers who are continued "by constitutional enactment are as clearly within the "contemplation and protection of the Constitution as "are the officers themselves, and the legislature has no "more power to deprive those officers of their authority, "and confer that authority upon officers not of local "selection, than it has to abolish the offices. It is just "as essential to local self-government that the functions "of elective officers be preserved to such officers as that "the right of election be protected; indeed, it is the "local management of local concerns, by and through "the medium of officers of their own selection, that is "sought to be protected. Strip the officers of a munici-"pality of their functions, and you rob the munici-"pality of its vitality. * * *

"2. The act undertakes to convert certain highways "already laid out—presumably by township authority—"into state roads, and to give to the board of super-"visors authority to convert other roads into state "roads.

"State roads are such only as have been laid out by "state authority. * * *

"Section 23 of Article 4 of the Constitution expressly "prohibits the discontinuance by the legislature of "highways laid out by township authorities. The right "of the legislature to vacate state or territorial roads "is unquestioned. If highways may be converted into "state roads by legislative declaration, and state roads "may be discontinued at the will of the same body, "then the constitutional provision may be easily "avoided" (pp. 293-301).

In Detroit Citizens' Street Ry. Co. *vs.* City of Detroit, Circuit Court of Appeals, 22 U. S. App., 570; 64 Fed. Rep., 628, the statutes and ordinances now involved were before the court, and the question was whether the city had power to make a grant extending beyond the time limited for the corporate existence of the corporation. The court held that under these provisions, when construed together and with regard to the peculiar constitutional policy of the state limiting the legislative power in respect of direct interference with purely local concerns of cities, the general charter powers of the City of Detroit over its

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streets, the general purpose the legislature had in view, and other sections of the same acts which provided for acquiring rights of way and for mortgaging street railways, including their rights of way, every such mortgage to be deemed a mortgage upon real estate, the power of the City of Detroit to give the consent required was not a power merely implied and therefore to be strictly construed, but was directly conferred and authorized, a grant of such easement of way in the streets as was requisite for the purposes to be accomplished; and as such power was conferred without express words of limitation, and the "terms and conditions" on "which the grant was to be "made were left to the discretion of the local govern- "ment, the term of such a grant was not necessarily "limited by the duration of the franchises of the "grantee." The court said, the "right to occupy par- "ticular streets with necessary tracks and equipments" by reason of the constitution, "could not come from the "state, and, if acquired at all, must come from "the municipality (p. 641). If this view of the "limitations upon the legislative power of the "state be sound, it must follow that when the state "acts in the only way that it can act—by conferring "upon the municipality the powers necessary to the "establishment of such public facilities of intra-city "travel—and does this in general terms, limitations "upon the discretion of the municipality in the exercise "of that power ought to be plainly apparent before the "court will be justified in declaring their existence (pp. 642, 643). The power to make an irrevocable "contract giving an easement of some considerable du- "ration is an inseparable incident in any scheme for "furnishing such public facilities as a street railroad. "The duration of such grants must be a question of dis- "cretion to be exercised by some public authority. "That the exercise of that discretion should be left to "the local government as a question of purely local in- "terest seems most consistent with the proprieties of the "case and most in accord with the decentralizing "policy so peculiar to the state of Michigan" (p. 647).

The cases of Saginaw Gas Light Co. *vs.* City, 28 Fed. Rep., 529, and Grand Rapids Company *vs.* Company, 33 Fed Rep., 659, involved the question of exclusive franchises and were decided without reference to the pro-

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visions of the Michigan constitution. They are, therefore, without application here.

The State, then, could not be a "party to or interested in" the streets and highways and the legislature could not vacate or alter the same. The result of these constitutional provisions was that the City and not the State had the power regarding streets, which under most constitutions, would be in the State. The subject was beyond the control of the legislature (New Orleans *vs.* Houston, 119 U. S., 265, 275, 276).

Nevertheless, it is claimed that this grant can be repudiated after the lapse of thirty-two years solely because it was not made by the legislature but by the council. Whatever force this contention might have under the law in some other States, in the present case it is clearly without merit. By express provision of the constitution, the streets were constructed and controlled not by the State but by the City, so that the latter did not stand to the State in the usual relation of a mere agency of government. The legislature could neither lay out, construct nor change the streets.

It is, therefore, idle to claim that the legislature was supreme in regard to the manner in which property vested by virtue of the terms of the constitution in an independent municipal body should be used by its owners. The people saw fit to exclude the State from any rights of ownership in the highways. They inserted no provision in the constitution giving the legislature control over property regarding which they had in terms provided that the State, which was itself merely one of the people's agencies of government, should not own or be interested in it. On the contrary, so far as concerns the suggestion that the power of making a grant such as the present was necessarily in the legislature alone, the constitution disabled and excluded the legislature from exercising any such power by providing that corporations could not be created by special act (Art. XV., Secs. 1, 10).

In the absence of any provisions conferring upon the legislature power in the premises, there can be no ground for claiming that the ultimate control of such property was in the legislature and not in its constitutional owner, the City. At the ut-

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most, the legislature has power to exercise such part of the functions of the State as are apportioned to it and not withheld from it by the terms of the constitution. "As to the property it "thus holds for its own private purposes, a city is to be re- "garded as a constituent in state government, and is en- "titled to the like protection in its property rights as any natural "person who is also a constituent" (Board of Commissioners *vs.* Council, 28 Mich., 228, 240). There can be nothing in the contention that the legislature has inherent power to control the use of property from the construction, ownership and alteration of which the State is expressly excluded. The right to control the property is merely an incident of ownership, and as that by the constitution is vested in the City, so also must be the right to control that which the City thus owns.

Elsewhere the State ordinarily holds all rights of the public, and the inferior municipalities are mere instruments of government exercising no functions save those conferred upon them by the legislature. But here, under the terms of the constitution, the State could not own or be interested in the streets, while the City has constructed and owns them. In Michigan, the City as the constitutional owner of the streets could grant any rights which it is elsewhere held must be granted by the State, because it is the owner thereof.

The Council, therefore, was authorized to pass the ordinance by reason of the provisions of the constitution of the State.

Points.

SECOND.

In any event, the statutes of the State fully authorized the Council to pass the ordinance.

As just seen, under the terms of the Constitution, the legislature could neither lay out, construct nor alter the streets. Yet the defendants claim that the legislature was supreme regarding the manner in which they should be used. It has already been pointed out that, in the absence of any construction, ownership or right to alter the streets upon the part of the State, there is no support for the claim that it has the right to control them. In the nature of things, the State has no greater power of control over property from the ownership of which it is expressly excluded by the constitution, than any private individual has regarding property which he does not own. In addition to this, however, it will now be shown that any power of control which could possibly have remained in the legislature was delegated by that body itself to the Council.

It was provided by statute that the Common Council of the City of Detroit should have authority "to control, prescribe "and regulate the manner in which the highways, streets, "avenues, lanes, alleys, public grounds and spaces within said "city shall be used and enjoyed" (Laws of 1857, Act No. 55 at p. 97). This alone would be sufficient to empower the municipal authorities to authorize construction of railways in the streets (Detroit Citizens' Street Railway *vs.* City, 64 Fed. Rep., 628, 636; Elliott on Roads and Streets, 563; Dillon on Municipal Corporations, 4th Ed., § 719).

But the statutes provided also that "all companies or cor- "porations formed for such purposes" (construction and operation of street railways) "shall have the *exclusive* right to use "and operate any street railways constructed, owned or held by "them; provided, that no such company or corporation shall "be authorized to construct a railway under this act through "the streets of any town or city without the consent of the "municipal authorities of such town or city, and under such "regulations and upon such terms and conditions as said au- "thorities may, from time to time, prescribe; provided, further,

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Second. The ordinance was authorized by the statutes.

" that after such consent shall have been given and accepted " by the company or corporation to which the same is granted, " such authorities shall make no regulations or conditions " whereby the rights or franchises so granted shall be destroyed " or unreasonably impaired, or such company or corporation " be deprived of the right of constructing, maintaining and " operating such railway in the street in such consent or grant " named, pursuant to the terms thereof" (Laws of 1855, as amended by adding Sec. 34, Compiled Laws of Michigan, 1871, Vol. 1, p. 827; Howell's Statutes, Sec. 3527). While these provisions were not quite so full when the ordinance was passed, since March 5, 1867 they have been and now are the law by which the Council is controlled (1 Howell's Statutes, 906).

Thus the statutes authorized the Council to grant to street railway companies the right to construct railroads in the streets which the grantee should have the *exclusive* right to use and operate; they provided still further that after the consent of the Council had been given, it could do nothing whereby the rights or franchises granted should be destroyed or impaired or the company deprived of the right of constructing, maintaining and operating such railway pursuant to the terms of such consent. The legislature, therefore, expressly authorized the Council to make grants of an exclusive character and provided that, after it had done so, the Council could take no action impairing the grant. It is fully settled in this court that an exclusive grant made under such authority would be entirely lawful. "Conceding that the " legislature of the State alone had the right to make such a " grant, 'it may,' as was observed in Wright *vs.* Nagle, 101 U. " S., 791, 794, 'exercise this authority by direct legislation, or " ' through agencies duly established having power for that " ' purpose. The grant, when made, binds the public, and is " ' directly or indirectly the act of the State. The easement is " ' a legislative grant, whether made directly by the legislature " ' itself or by any one of its properly constituted instrumental- " ' ities' " (City Railway Co. *vs.* Citizens' Railroad Co., 166 U. S., 557, 563; Penn Life Co. *vs.* Austin, 168 U. S., 685, 694; New Orleans Water Works Co. *vs.* New Orleans, 164 U. S., 471).

Points.

Second. The ordinance was authorized by the statutes.

As already stated, the ordinance in question provided that the company therein named should be "exclusively authorized " to construct and operate railways as herein provided on and through" (certain streets therein named), " and *through such* " *other streets and avenues in said city as may from time to* " *time be fixed and determined by vote of the Common Coun-* " *cil of the said city of Detroit*, and assented to in writing " by said corporation. * * * And provided the corporation " does not assent in writing within thirty days after the pass- " age of said resolution of the Council ordering the formation " of new routes, then the Common Council may give the privi- " lege to any other company to build such route" (Rec., p. 12).

The legislature, then, conferred upon street railway companies "the *exclusive* right to use and operate any street railway constructed, owned or held by them." The Common Council enacted that the predecessor of the plaintiff in error should be "*exclusively* authorized to construct and operate railways on and through" certain streets. These provisions are to be construed in harmony with the rule that "a Common Council cannot properly so multiply street railway tracks in a particular street as to interfere with the rights of the general public in the street" (Street Ry. Co. *vs.* West Side Co., 48 Mich., 433, 434). The practical result is that the railway company received by statute from the legislature the exclusive right to *use* and *operate*, and by ordinance from the Common Council the exclusive right to *construct* and *operate* a railway on and through certain streets then named and other streets to be thereafter selected at the pleasure of the Common Council.

In the absence of proof, the acceptance of this ordinance by the grantee would be presumed (City Railway Co. *vs.* Citizens' Railroad Co., 166 U. S., 557, 568). But the record shows that the ordinance was duly accepted by the grantee, which at once proceeded to construct its railways on and through the streets which were therein fixed and determined, and, from time to time, as other streets were fixed and determined, constructed railways thereon.

The Council, therefore, acting within its statutory author-

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ity, made this grant; the grantee duly accepted it; the statute provided that thereafter the Council could do nothing whereby the rights or franchises granted should be destroyed or impaired or the company deprived of the right of constructing, maintaining and operating such railway. pursuant to the terms of the consent or grant.

Upon what ground, then, can it be claimed that the Council may now take action impairing this grant and depriving the company of the right of constructing and operating its railway in accordance therewith? The grant was of the right during a limited number of years to construct and operate railways on and through (1) certain streets expressly named, and (2) such other streets and avenues as might from time to time be fixed and determined by the Council. As to the latter, however, the grantee had no power of selection—the Council reserved that right to itself—and the grantee had merely a period of thirty days after the Council had made such selection to determine whether it would undertake the work. In case it did not do so, the Council was at liberty to contract with other parties. It cannot possibly be claimed that the Council had not full power when the ordinance was passed to designate as many streets as it saw fit. The defendants' claim is that the legislature did not confer upon the Council power to reserve to itself the right to designate further streets in the future. There can be no doubt that, even upon the defendant's theory of the law, the legislature had that power, but the defendants maintain that a general provision authorizing the Council to make grants which would be exclusive did not empower it to reserve the right to designate other streets as additional lines of road might be needed. It will be seen that the defendants' contention reduces itself to very narrow limits. It is without merit on principle or authority.

The defendants have heretofore laid much stress upon the contention that this grant was bad because it was exclusive and tended to establish a monopoly, and have cited a number

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of cases to the effect that in the absence of an express grant of such authority by the legislature, a municipality is without power to make an exclusive grant (Jackson Co. *vs.* Interstate Co., 24 Fed. Rep., 306; Saginaw Gaslight Co. *vs.* City, 28 Fed. Rep., 529; Grand Rapids Co. *vs.* Co., 33 Fed. Rep., 659; Norwich Gas Light Co. *vs.* Norwich Co., 25 Conn., 19; State *vs.* Cincinnati Co., 18 Ohio St., 262; Birmingham Railway Co. *vs.* Railway Co., 79 Ala., 465; Long *vs.* Duluth, Supreme Court of Minnesota, 51 N. W., Rep., 913; Denver Co. *vs.* Co., 2 Colorado, 673; Parkhurst *vs.* Capital City Co., 23 Oregon, 471; Booth on Street Railway Law, Sec. 108).

This contention, however, can have no weight in this court. It is settled that an exclusive grant is not in itself unlawful, and that the legislature may delegate the power to make such a grant to the municipal authorities (*supra*, pp. 5-8, 18). In the present case the statute in terms provides that the City may make an exclusive grant and cannot withdraw its consent after it has been once given (*supra*, pp. 18, 19). There is, therefore, no ground to claim that the consent is unlawful because it constitutes an exclusive grant.

But in addition, as already said, this claim has no foundation in fact. This ordinance was not an exclusive grant and its terms did not establish a monopoly. The Railway Company was not given the right to determine where railways should in future be constructed nor the right to construct all such railways. The Council reserved to itself the right to designate new routes; the ordinance did not commit the discretion in that regard to the grantee. That was what was held to be the objectionable feature in Citizens' Railway Co. *vs.* Jones, 34 Fed. Rep., 579, and Knoxville *vs.* Africa, 77 Fed. Rep., 501, 509. From that objectionable feature the present case is quite free. The provision is merely that when new routes are fixed and determined by the Council, complainant shall have the right during thirty days to decide whether it will construct them. Its practical effect is merely the same as any grant of the right to construct street railroads. "A common council cannot properly so mul-

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" tiply street railway tracks in a particular street as to interfere " with the rights of the general public in the street" (Street Railway *vs.* West Side Co., 48 Mich., 433, 434). When the right to maintain and operate tracks in a given street is granted to one corporation, practically it is denied to all others (People *vs.* O'Brien, 111 N. Y., 1, 41 ; Fidelity Co. *vs.* Mobile Co., 53 Fed. Rep., 687 ; Indianapolis Cable Co. *vs.* Citizens Co., 127 Ind., 369.) But this does not have the effect of creating a monopoly, even where the State constitution prohibits the granting of exclusive privileges and franchises. In Booth on the Law of Street Railways, Sec. 55, it is said that " under the " general power conferred upon cities to control the use of their " streets and to prescribe the conditions upon which they may " be occupied by street railways, the local authorities have the " right to designate the streets which shall be subject to the " franchise and in what particular parts of the streets the " tracks shall be laid. This power is not affected by a con- " stitutional provision inhibiting the granting of special or " exclusive privileges, immunities or franchises. Such pro- " visions are limitations upon the power of the legislature, but " cannot be construed as a limitation on the power of a muni- " cipal corporation to designate streets in which the railway " may be constructed and to fix conditions upon which it may " be operated."

Necessarily the Council was authorized to grant prior rights to one corporation over those of another. The grant to one company also necessarily anticipated any grant to another. The option given to the grantee gave it merely a prior right to lay its railways in the streets and avenues thereafter to be determined by the Common Council. This, as just pointed out, was not an exclusive right and is open to no greater objection than any grant of the right to lay railroad tracks in a street. For all such grants are necessarily prior to any other grants in the same streets.

As already said, therefore, the defendants' attack upon the ordinance depends wholly upon its claim that it was not competent for the Council to reserve to itself the right to designate additional streets in the future.

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Second. The ordinance was authorized by the statutes.

The Council, when the ordinance was passed, had power to name whatever streets it saw fit as those in which a street railway was authorized. Accordingly, it named a number of streets, and the Railway Company, by organizing and accepting the grant, became bound to construct its road in the streets named. The same course was to be pursued in the case of streets which might require railways in the future as was pursued in the case of streets which actually required railways at the time when the ordinance was passed. The Common Council merely reserved to itself the right to fix and determine upon what further streets railway tracks should be laid. This was properly the exercise of a duty devolving upon the municipal authorities (Citizens' Street Ry. Co. *vs.* Jones, 34 Fed. Rep., 579; Fort Worth Co. *vs.* Rosedale Ry. Co., 68 Texas, 169, 182). The arrangement was in accordance with ordinary practice. "The municipal authorities * * * may "name one or more routes in the original ordinance, and reserve "to themselves the right to determine when additional tracks "or routes will be rendered necessary by the requirements of "traffic" (Booth's Law of Street Railways, Sec. 61).

Mere lapse of time between the date of the grant and the laying of the tracks, even if it were due to the grantee's failure to act, would not impair its rights (Elliott's Law of Roads and Streets, 571; Booth's Law of Street Railways, Sec. 51; Brooklyn Central Co. *vs.* Co., 32 Barb., 358; Coney Island Co. *vs.* Kennedy, 15 App. Div., 588; Philadelphia Co. *vs.* Williams, 54 Pa. St., 103; Black *vs.* Reading Co., 58 Pa. St., 249; People's Co. *vs.* Baldwin, 14 Phila., 231; Ransom *vs.* Citizens' Railway Co., 104 Mo., 375). But in the present case, whatever delay there might be would be due not to the grantee, but entirely to the manner in which the grantor might decide to exercise the discretion which it reserved to itself to fix and determine new routes.

As a general principle, it is quite competent to grant rights regarding property to be designated or even to be acquired by the grantor in the future. There is no ground to claim that such rights are lost by failure of the grantor for a considerable time to designate

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the precise property covered by the grant; even if it has no existence at the time thereof, the rights granted attach as the property comes into existence (Bear Lake Irrigation Co. *vs.* Garland, 164 U. S., 1, 15, 16). In accordance with this general rule, when a grant is made by the government the precise subject matter of which is thereafter to be designated by the government itself, delay in making such designation, will not defeat the grant; when the designation is made it relates back to the original date of the grant (Railroad Co. *vs.* Smith, 9 Wallace, 95; Schulenberg *vs.* Harriman, 21 Wallace, 44; Railway Co. *vs.* Alling, 99 U. S., 463). The mere failure of the Council to fix and determine at any special time, the additional streets, therefore, could not prejudice the rights secured to the plaintiff in error when the designation should in fact be made.

As the Council had power to grant the right to build railways in the streets, there was nothing objectionable in the course pursued. It had power when the ordinance was passed to name whatever streets it saw fit as those in which a street railway was authorized. Accordingly, it named a number of streets and the Railway Company, by organizing and accepting the grant, became bound to construct the road in the streets named. Inasmuch, however, as the public necessities would doubtless increase, it was natural and proper to provide that the City should have the right to designate further streets for the purpose of forming new routes and the grantee should have the right to elect whether it would construct the road upon the streets so designated.

Accordingly the recent authorities show that defendants' claim that the ordinance was beyond the power of the Council because it reserved the right to designate further streets in the future, is without merit.

In City Railway Company *vs.* Citizens' Street Railroad Company, 166 U. S., 557, the Citizens' Street Railway Company of Indianapolis was organized in 1864, under a general act of the legislature authorizing such a company to be a body politic and corporation in perpetuity.

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Second. The ordinance was authorized by the statutes.

Upon January 18, 1864, the Common Council of that city passed an ordinance authorizing the company to lay tracks upon designated streets and providing that the right to operate said railway should extend to the full term of thirty years, during which time the said authorities were not to extend to other companies privileges which would impair or destroy the rights so granted. In the following year, 1865, a supplemental ordinance was passed giving to the company the right to lay its tracks upon all the streets or roads within the corporate limits of the city and providing that in laying, constructing and operating the same the company should be governed by the provisions of the ordinance aforesaid. It will be seen, therefore, that the rights granted were far more comprehensive than those in the present case because they were an exclusive grant of the right to lay tracks upon all streets of the city. On April 7, 1880, the Council passed another ordinance providing that the original ordinance should be amended so as to read "thirty-seven" where the same then read "thirty." The Citizens Street Railroad Company which was the complainant below, duly succeeded to the rights of the grantee under these ordinances. Upon April 24, 1893, the Council, claiming that the extension of the ordinance was invalid, entered into a contract with the defendant, the City Railway Company, giving it permission to lay its tracks through a large number of streets, most of which were already occupied by the lines of the complainant company. The court held that the complainant had a contract with the city which the city was attempting to impair; that the ordinances granting the same were valid; that as the Railway Company had acted upon the ordinance extending the duration of the grant, the city was estopped from alleging that there was no consideration to support it; that in any event the continued operation of the road was a sufficient consideration for the grant, and that an acceptance thereof would be presumed from the fact that the amendment was beneficial to the corporation and that, therefore, the contract arising from said ordinances was in all respects valid

In Detroit Citizens' Street Railway Company *vs.* City of Detroit, 22 U. S. App., 570; 64 Fed. Rep., 628, the ordinances involved in the present case were under consideration. A suit was brought by the city against the Detroit

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City Railway, the Detroit Citizens' Street Railway Company and others, upon the claim that the rights of the plaintiff in error could not extend beyond the period of corporate existence of the original grantee and had, therefore, expired. The object of the suit was an injunction to compel removal of the tracks from the streets and restrain further operation of a street railway therein. The contention was that the general power conferred by statute upon the city to make grants of authority to construct and operate railways in the streets, should be deemed to be limited to the duration of the corporate existence of the grantee. The court held that this contention was without foundation; that the legislature had conferred upon the city all power in the premises which was possessed by the legislature itself, and that no limitations thereon would be implied. After considering the provisions of the constitution and statutes of Michigan, the court said: "If this view of the limitations "upon the legislative power of the state be sound, it "must follow that when the state acts in the only way "that it can act—by conferring upon the municipality "the powers necessary to the establishment of such "public facilities of intra-city travel—and does this in "general terms, limitations upon the discretion of the "municipality in the exercise of that power ought to be "plainly apparent before the court will be justified in "declaring their existence (pp. 642, 643). * * We "are thus led to conclude that these street railway acts "directly confer upon the municipalities of the state "power to grant to street railway companies such an "easement of way in the streets as is requisite for the "purposes to be accomplished. That power is conferred "without any express words of limitation. On the con- "trary, the 'terms and conditions' upon which the "grant is to be made are left to the discretion of the "local government. Unless there be some limitation "implied by other considerations not yet alluded to, the "term for which such a grant may be made is just as "much a matter about which municipal discretion is to "be exercised as any other of the terms of the grant (p. "646). * * The duration of such grants must be a ques- "tion of discretion to be exercised by some public "authority. That the exercise of that discretion should "be left to the local government as a question of purely "local interest seems most consistent with the pro-

" prieties of the case, and most in accord with the decen-
" tralizing policy so peculiar to the state of Michigan "
(p. 647).

In Africa *vs.* City of Knoxville, 70 Fed. Rep., 729, the city had consented to a railroad covering certain specified streets with a general statement including all the streets of the city then established or thereafter to be established. The Circuit Court held that this grant was good. Its decision was, however, reversed by the Circuit Court of Appeals, 77 Fed. Rep., 501, upon the ground that the power delegated to the city government was not an unlimited one, and that it had no power to delegate to a private corporation the decision of the question where street railroads should be located (p. 508). It will be seen that this radically differs from the present case, inasmuch as the City here has reserved to itself the right to fix and determine upon new routes, and the plaintiff in error has no right save merely to determine whether or not it will construct the railroads to be laid upon the routes so fixed and determined.

Other authorities supporting the ordinance are, Des Moines Railroad Co. *vs.* Street Ry. Co., 73 Iowa, 513; City *vs.* Newport Co., 84 Ky., 166:

Manifestly, therefore, not only the constitution but also the statutes of the state authorized the Council to pass this ordinance.

CONCLUSION.

The Decree should be reversed.

The statutes of Michigan describe the action of the city in passing this ordinance not as a license but as a grant (Howell's Statutes, Sec. 3527). And it is well settled that the ordinance constituted a contract between the city and the grantee.

Points.

Conclusion. The decree should be reversed.

(City Railway Co. *vs.* Citizens' Railroad Co., 166 U. S., 557, 567).

So this court has said that the charter of a gas company, "so far as it created a corporation with authority "to manufacture gas and to distribute the same by "means of pipes, mains and conduits, laid in the streets "and other public ways of (the city), constituted, to use "the language of this court in the case of the Delaware "Railroad Tax, 18 Wall., 206, 'a contract between the "'state and its corporators, and within the provision "'of the constitution prohibiting legislation impairing "'the obligation of contracts' and, therefore, 'equally "'protected from legislative interference, whether the "'public be interested in the exercise of its franchise "'or the charter be granted for the sole benefit of its cor-"'porators'" (New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650, 666).

The same thing is held in Citizens' Street Railway Co. *vs.* City Co., 56 Fed. Rep., 746, 64 Fed. Rep., 647; City *vs.* Western Union Co., 63 Fed. Rep., 68; Baltimore Co. *vs.* Mayor, 64 Fed. Rep., 153; Mayor *vs.* Africa, 77 Fed. Rep., 501; Central Trust Co. *vs.* Citizens' Co., 82 Fed. Rep., 1; Mayor *vs.* Second Avenue Co., 32 N. Y., 261; Matter of Thirty-fourth Street Railroad Co., 102 N. Y., 343; People *vs.* O'Brien, 111 N. Y., 1, 49; Brooklyn Central Co. *vs.* Brooklyn City Co., 32 Barb., 358; Adamson *vs.* Nassau Co., 89 Hun, 261; Metropolitan City Railway Co. *vs.* Chicago Co., 87 Ill., 317; Nash *vs.* Lowry, 37 Minn., 261; Springfield Co. *vs.* Springfield, 85 Mo., 674; State *vs.* Murphy, Supreme Court of Missouri, 31 S. W. Rep., 594; Asheville Co. *vs.* Asheville, 14 S. E. Rep., 316; Birmingham Co. *vs.* Co., 79 Ala., 465; Booth's Law of Street Railways, Secs. 8—10; Elliott's Law of Roads and Streets, 564.

In protecting these contract rights against impairment, the construction put by the courts of the state upon its statutes and constitutions, is not binding upon this court; its own judgment with reference thereto must necessarily control upon the question whether the case comes within the constitutional guaranty. (Wright *vs.* Nagle, 101 U. S., 791; Yick Wo *vs.* Hopkins, 118 U. S., 356; Douglas *vs.* Kentucky, 168

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U. S., 488, 501; Central Trust Co. *vs.* Citizens' Co., 82 Fed. Rep., 1.)

Not only do the strict rules of law prohibit the City from impairing the obligation of this contract; it would also be grossly inequitable to allow the plaintiff in error to be deprived of a very substantial part of the consideration which led it to invest its money in Detroit. It appears that the City had solicited capitalists to come to its aid and meet the necessities of its citizens by constructing a system of street railways and that no one had been found willing to do so except the predecessors of the plaintiff in error (pp. 103, 104, 122-127). The success of the undertaking was evidently uncertain. But the burden of building many lines through sparsely populated portions of the City, which must be unprofitable for some time to come, was assumed by the grantee, in reliance upon the covenant of the city to give it, for a limited time, the prior right to extend its lines through other streets of the City when changed conditions should warrant the construction of additional lines of railway. So far as the question is material, the reasonableness of the provision regarding future roads is to be judged by conditions existing when that provision was made (Toledo etc. Co. *vs.* Jacksonville, 67 Ill., 37; Tiedeman on Police Power, Sec. 194; Dillon on Municipal Corporations, 4th Ed., § 327).

Accordingly, when the City adopted the ordinance, it entered into an irrevocable contract with the grantee therein designated in the terms of that ordinance. In making this contract the City had authority to prescribe the terms and conditions upon which the grantee might construct and operate its lines and railway. In so doing, the needs of the public at the time were doubtless consulted, and the minds of the parties met on the prescribed terms and conditions because full consideration was given to the circumstances then existing. Some of the streets thereafter to be occupied by the lines of the grantee were not then designated, for the reason that the Council could not then determine by the use of what streets the convenience and necessities of the citizens would best be served.

Points.

Conclusion. The decree should be reversed.

The provision for a future determination of the particular streets to be occupied, was for the benefit of the City, but the provision which gave the grantee the option to occupy such streets upon the notice prescribed, was for the protection of the grantee and was a grant for a good consideration, namely, the undertaking to construct and operate at once such portions of the proposed system of railways as the public needs then required.

With the growth of the City and the decrease in the cost of building street railways, those who took none of the early risks have asked the City to give them the right to construct additional lines of railway in disregard of the rights of the pioneer organization under its contract with the City. There is no suggestion of any fault upon the part of the plaintiff in error; no suggestion that the necessities of the public will not be fully served if the City complies with the terms of its agreement. The effort to repudiate the terms thereof is based upon nothing save the claim that the Council originally exceeded its authority. The effort of the City is to retain the consideration for the grant which was ample (City Railway Co. *vs.* Citizens' Railroad Co., 166 U. S., 557, 566), but to repudiate the obligation which it gave therefor. Such a position should merit and receive no greater consideration from a court of equity in the case of a municipal corporation than in that of any other party.

It is, therefore, respectfully submitted that the complainant and plaintiff in error was entitled to the relief prayed in the bill, and that the decree should be reversed.

David Wilcox,
Frank Sullivan Smith,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE DETROIT RAILWAY, and
THE CITY OF DETROIT.

In Error to the Supreme Court of the State of Michigan.

Brief of Henry M. Duffield for Plaintiff in Error.

STATEMENT OF CASE.

The jurisdiction of this Court over the case is settled by the decision in City Railway Company vs. Citizens' Street Railroad Company, 166 U. S., 557.

The facts in the case in detail are clearly stated in the brief of Mr. Donnelly.

The important question in the case is: Was the ordinance of the City of Detroit of November 24, 1862, establishing a system of street railways for the city, valid in

so far as it agreed to give to the Detroit City Railway the first right to build and operate such extensions and new routes as the Common Council might thereafter order?

The defendant the Detroit Railway built its street railway after express notice of the claims of complainant under this ordinance and while this suit was proceeding to enjoin them from so doing. The question, therefore, is in no way confused by any equities in favor of the defendant street railway.

In 1862 Detroit had a population of about 50,000 and no street railway. There was, however, a strong desire on the part of the people for a street railway system suiting the street plan of the city. The Common Council had offered in May, 1862, to H. K. Sanger and his associates, when organized into a corporation, the right of way for a street railway through the same streets again named in the ordinance of November 24, 1862.

In addition to streets named in the ordinance, it included such other streets and avenues in said city "as may from time to time be fixed and determined by vote of the Common Council of said City of Detroit, and assented to in writing by said corporation." It did not, however, grant the exclusive right of way over these streets, and was not accepted by the grantees. Thereupon in August, 1862, by direction of the Common Council, the City Controller advertised for 30 days for proposals for building a street railway in the streets named and under the terms contained in the May ordinance. As a result of this advertisement the city adopted the ordinance of November 24, 1862, which is here in question.

This ordinance granted to one Bushnell and his associates, when organized into a street railway corporation, the exclusive right to construct and operate a street railway upon the streets named in it, and "through such

other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of said City of Detroit and assented to in writing by said corporation." It provided, however, that if the corporation did not so assent within 30 days after the passage of the resolution ordering the formation of new routes, then the Common Council might give the privilege to any other company to build such route, and such company should have full right of crossing at their own cost and expense any tracks already laid.

It was amended December 27, 1862, and January 12, 1863, as to matters which are not material to the question here.

Bushnell and his associates thereupon organized the corporation of the Detroit City Railway, which accepted the ordinance and constructed and operated the street railways provided for therein.

The defendant railway company and the City of Detroit challenge the validity of this contract as beyond the power of the city upon two grounds:

First. Because it granted to the Detroit City Railway rights of way in streets which were not designated by name in the ordinance, but by its terms were to be determined in the future.

Second. Because the grant was in its terms exclusive.

The question, therefore, is one of construction and interpretation of the power of the city in respect of the subject matter of the contract, under the peculiar jurisprudence of Michigan.

Preliminary to the discussion of this question the following propositions are submitted in the confident belief that they are so well established upon reason and by authority as to need no extended argument:

1st. That the exclusive provisions in a contract of this nature are not in and of themselves invalid.

New Orleans Gas Light Co. vs. Louisiana, etc., Co., 115 U. S., 650.
New Orleans Water Works Co. vs. Rivers, Id. 674.
Louisville Gas Co. vs. Citizens' Gas Light Co., Id. 683.

2nd. That under the law of Michigan street railways —whether the motive power be animal or electricity— are but an improved mode of street use and are not an additional servitude which owners of abutting lands may restrain.

R. R. Co. vs. Heisel, 38 Mich., 62.
Grand Rapids Street Railway Cases, 48 Mich., 433.
People vs. Railway Co., 92 Mich., 522.
Detroit Citizens' St. Ry. Co. vs. Detroit, 12 C. C. A., 365, 372.

3d. That local self-government is peculiarly preserved and secured to the citizens of Michigan by the Constitution of the State, and the power of the State in respect of direct interference with purely local concerns of cities is materially limited.

Allor vs. Wayne Co., 43 Mich., 76-97.
People vs. Hurlbut, 24 Mich., 44.
Hubbard vs. Springwells, 25 Mich., 153.
People vs. Com. Council of Detroit, 29 Mich., 108.
Detroit Citizens' Street Ry. Co. vs. Detroit, 12 C. C. A., 365, 378-9.

4th. That in the interpretation of legislative provisions designed to confer power upon municipalities over purely local concerns, consideration must be given to this State policy as well as to the fact that the Legislature, in the interest of local government, ought to confer a wide discretion upon municipalities, being itself incompetent to legislate directly upon such concerns.

Detroit Citizens' St. Ry. vs. Detroit, ubi sup.

5th. That therefore when the State acts in the only way it can act, by conferring in general terms upon the municipality the powers necessary to the establishment of such public facilities of intra urban travel, limitations upon the discretion of the municipality in the exercise of that power ought to be plainly apparent before the courts will be justified in declaring their existence.

Detroit Citizens' St. Ry. Co. vs. Detroit, 12 C. C. A., 365-379.

Under these propositions we submit that the City of Detroit was vested with the power to grant such street rights as were requisite to provide its citizens with an adequate and suitable system of street railways.

I.

Recurring to the objections alleged against the validity of this contract ordinance of 1862, did the City of Detroit have power to enact the provision in section two?

Was its power strictly confined to giving a right of way over streets specifically enumerated in the ordinance, and upon which the street railway was to be built *in presenti?*

The general grounds of this objection will be discussed later in connection with the second objection, but some considerations growing out of the particular situation seem pertinent here.

The record clearly shows that in 1862 there was a pressing need for a system of street railways in Detroit.

The city and not the company determined the system and designated its routes. The wisdom of this plan is

apparent. The street plan of the city was peculiar. Two of its principal streets, Woodward avenue, running north from the river, and Jefferson avenue, running east and west, each extending entirely across the city, cross each other at right angles but a short distance from the river, which is the southerly boundary of the city. Three other avenues, Michigan, Grand River and Gratiot avenues, extend diagonally west, northwest and northeast respectively to the city limits. But in the center of the city all run into Woodward avenue, which is the main street of the city.

The business heart of the city in 1862 was on Woodward avenue, from about the Campus Martius, south to Jefferson avenue and the river.

A city thus laid out specially called for a system of street railways, each line of which could have equal terminal facilities along Woodward avenue to the heart of the city. It was obvious that as the city grew and extended its limits the residents on the portions of the principal avenues, Jefferson, Woodward, Grand River and Gratiot, included in the extensions, should have the privilege of direct and quick transportation for one fare and without change of cars to the heart of the city. This would be impracticable if different companies occupied these streets. Such diverse ownership would compel the citizen to pay more than one fare and delay and incommode him by change of cars.

New routes in the then limits of the city might become necessary, with increasing population, and in the interest of the citizens such routes should be determined with reference to and be made a part of the same system.

The ordinance therefore designated the streets which should comprise the system best suited to the city's then needs, and provided for "ordering the formation of new routes by resolution of the council," as the city's needs

should increase or change. The right to determine these routes was wholly with the city. They could so designate routes that the company must take streets which could for the time being only be operated at a loss in order to secure other streets which would then or very shortly thereafter be remunerative.

In case of non-acceptance by the company in thirty days from the passage of "the resolution of the council ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails at their own cost and expense."

The case, therefore, is clearly distinguishable from the cases of Jackson & C. R. R. Co. vs. Interstate R. Co., 24 Fed. R., 306; Mayor of Knoxville vs. Africa, 77 Fed. R., 503, and others in which cities had surrendered to street railway companies the right to construct and operate street railways upon such streets as they should at any time thereafter choose for themselves. The reasons stated in these decisions for holding such grants void have no application to the case at bar.

The objection to the power of the city in this respect is technical in the extreme. To enforce it practically excludes the city from making wise and prudent contracts. It compels the city to shut its eyes to its future growth; to bargain and contract in a matter so essential to convenience of its citizens, upon the assumption that it will never increase in territory; to make a contract many years to run, during which it is certain the city will largely extend its limits, but to refrain from making any adequate provisions for such extensions. A street railway corporation is created for a long period of years. A street railway system is planned to satisfy not alone present but future needs.

In Africa vs. Board of Mayor and Aldermen, 10 Fed. R., 729, it is said, p. 735, by Clark, J.:

"In respect to this it is only necessary to say briefly that no commercial railroad and street railroad of any considerable importance is ever determined upon except as a system or plan, and it is certain in many or most instances that if after a partial completion of the plan the right to go further could be withdrawn by repeal of the franchise, it would render the system so far as extended of little value and would operate widely as a destruction of property and rights in proportion to the progress of the work at the time of the withdrawal."

It is true that the decision in this case was overruled in Mayor, etc., vs. Knoxville, 77 Fed. R., 503, but it was not because of any denial of this doctrine.

The Circuit Court of Appeals held that the grant of right of way in the case was not a grant of a right of way for a definite system, but an absolute surrender by the city to the street railway company of all control over *all the streets* in the city. A single quotation from the opinion, p. 503, will demonstrate the inapplicability of this decision to the case at bar:

"To say that the grant constitutes a route or system is absurd. The grant covers every street, and if occupied would result in a railroad upon the four sides of every city square. The city would be covered by a line of railroad having the system of a checkerboard regardless of the public interest and in defiance of the public necessity. No community would for a moment tolerate such an unnecessary and harmful obstruction of its streets, and no company could possibly contemplate such a multiplication of parallel lines crossed at right angles at each cross street by another series of like parallel lines. The clear purpose of the ordinance was to enable the grantee to elect from time to time what streets it would

occupy and what new lines, or exeensions of old ones, its interests as a private corporation would justify. To delegate this power to a street railway company is wholly inadmissible, violates every principle of public policy and has no sanction in law. The provision of the statute which we have heretofore cited providing that "no one of the streets of said city shall be used by said company * * * until the consent of the city authorities has been first obtained and an ordinance shall have been passed prescribing the terms on which the same shall be done," is a clear implication that the city authorities shall know what streets the proposed railroad is to occupy and intelligently determine whether the public interests will be subserved thereby."

It is not necessary that all the lines of a street railway system should be built at once. The city should certainly have the discretion to prescribe that certain routes should be built immediately and that others should be built after the first are completed. Nor is it necessary for the street railway company to at once occupy and lay its tracks on every portion of its right of way in order to preserve the grant.

The following statement of the law in this respect from Elliott on Roads and Streets, p. 570, has been quoted with approval by the Federal and State Courts:

"While it is, as we believe, true that some act must be done vesting the inchoate right conferred by a general grant, still we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of constructing a system and with reasonable diligence and in good faith does actually construct a considerable part of the system, it ought not to lose its rights unless it has failed

to comply with a proper demand to complete the system or has unreasonably delayed its completion."

Undoubtedly the courts would have the power and it would be their duty to examine critically the particular ordinance which it was claimed created such a system. If it was a mere pretence of a system in order to give a street railway company unlawful control of public streets in the future, it would not be sustained. In this, as in all cases, a court of equity would "look through the sign to the thing signified" and adjudge acocrdingly.

Certainly it seems unreasonable to contend that a city in Michigan, granting a right of way on a street for a street railway, may not make provision therein for a right of way in the future over such portions of said street as from time to time during the life of the company may be taken into the limits of the city. The present case affords an instructive illustration.

Woodward avenue extends from the Detroit River to the northerly limits of the city. In 1862 it was less than two miles long; in 1898 it is four and 2-5 miles long. From the easterly to the westerly limits of the city Jefferson avenue (and Woodbridge street, which is a prolongation of it) was in 1862 three and 7-10 miles. In 1898 it is seven and 2-5 miles. The Michigan avenue line from Woodward avenue to the present city limits is three and 4-5 miles; in 1862 it was only one and 8-10 of a mile. From Woodward avenue on Grand River to the present city limits is three and 4-5 miles; in 1862 it was only one and 7-10 of a mile. Gratiot avenue line terminated in 1862 at the then city limits, which were two miles inside of the present city limits. The extensions on these routes are longer than the original lines.

If two street railway companies were operating on each of these streets, the citizen must pay two fares and change cars at least once before reaching the heart of the

city on each of the six streets. Certainly these fourteen miles or more of street railways are operated under the ordinance to the far greater accommodation, convenience and economy of the citizens than would be possible if the restrictions contended for by the defendant railway were enforced.

II.

It is claimed that because the Michigan statute does not use the word "exclusive," the city had no power to grant an exclusive right to the Detroit City Railway; that such power can only be granted by express words.

Before the decision here under review, this question was twice brought to the attention of the Supreme Court of Michigan in

Grand Rapids Street Railway Cases, 48 Mich., 433.
and
People vs. St. Railway Co., 92 Mich., 522.

They are not alluded to in the opinion of the Court here under review.

In the first case the Court, Campbell, J., assumed the city's power, but decided that the complainant had lost its right on the streets in question by failure to build after a demand by the city under the terms of the ordinance.

In the second case the Court put the question to one side as not involved in the case, because the grant was sufficient for the purposes of that case even if the exclusive provisions were held void.

It is not in this case necessary to discuss this question as a general proposition. The question here is whether under the Michigan law the City of Detroit had such power.

The statute of Michigan gave to this street railway corporation these franchises; the right to be a corporation; the right to construct and operate a street railway, and collect tolls thereon, and to acquire and hold in its corporate capacity the property necessary for that purpose.

This was all the statute gave. It was all the Legislature of the State could give.

As said in Detroit Citizens' St. Ry. Co. vs. Detroit, 12 C. C. A., 264-379:

"It is evident that the Legislature could not grant to any street railway company the right to construct and operate its road upon any particular street. It may provide for the incorporation of such companies and endow them with the franchises necessary. For the necessary street rights they must be referred to the only authority which can grant such privileges—the local government of the municipality in which it is proposed to operate such road."

This has been the unbroken legislative construction of the law. In the forty-eight years which have elapsed since the adoption of the Constitution of the State, the legislatures have never attempted to make such a grant. The statute did not purport to give—because it could not lawfully do so—any right of way either in the public streets or on private property. It simply created a corporation capable in law of building and operating a street railway and charging tolls thereon whenever that corporation should secure from the city or private persons the necessary right of way upon which to build its tracks and run its cars.

In respect of this right of way the power of the city was sole, plenary and absolute. It could grant it or refuse it, in whole or in part. The Legislature could not

compel it to do either. The city could surround and safeguard its grant with "such regulations" and "such terms and conditions" as it saw fit.

The statute creating the street railway corporation endowed it with the necessary faculties, but prohibited it from constructing a street railway through the streets of the City of Detroit "without the consent of the municipal authorities, and under such regulations and upon such terms and conditions as the (municipal) authorities might from time to time prescribe."

The illustration used by the United States Circuit Court of Appeals in Detroit Citizens' St. Ry. Co. vs. Detroit, 12 C. C. A., 365, 380, is equally apt here: "What the legislature meant by the "consent" it intended the municipality should grant if it saw fit, is illustrated by Sec. 10 of the Tram Railway Law. That section permitted such companies to enter upon and condemn under the State's right of eminent domain a right of way 100 feet in width, but limited this right by prohibiting the location of such road "through any orchard or garden without the consent of the owner thereof."

The same words used in the same connection must certainly have the same meaning unless the inherent nature of the subject matter compels a different interpretation. But there is nothing of the kind in this case. The ordinance in question did not surrender any of the police powers of the city.

The street railway company may be compelled to change the construction of their roadbeds to conform to changed and improved conditions of the street;

Detroit vs. Fort Wayne, etc., R. R. Co., 90 Mich., 646.

to remove the projecting ends of its ties when in the judgment of the Common Council they will injure by jarring a contemplated concrete pavement; *ibid.*

The Common Council has power to order (and it has compelled) the use by the company of a new and improved style of rail which lessens the obstruction of the tracks to other travel; to provide vestibules for its motormen; to properly warm, light and heat its cars for the comfort of passengers.

It can be compelled by subsequent ordinance to keep tickets, giving a reduced rate of fare, for sale on its cars.

Detroit vs. Ft. Wayne & B. I. R. R. Co., 95 Mich., 456.

It can be compelled to run its cars as often as the Common Council, in the fair exercise of its discretion, may deem necessary and reasonable.

People vs. Detroit Citizens' St. Ry., 74 N. W., No. 7.

In short, the right to regulate the construction and the use of the tracks of the company, and the equipment and operation of its cars, to conform to all the needs and convenience of the public, is still reserved to the city.

There is a slight reduction in ticket fares in the ordinance of the Detroit Railway; the cash fares are the same on both roads. But in the eleven hours of the least travel during the twenty-four its ticket fares are one and 1-24 of a cent less than the complainant's ticket fares. This, as is shown in Mr. Donnelly's brief, is largely, if not quite, compensated for in the reduction of taxes and the city's agreement to construct, repair, maintain and clean the Detroit Railway's roadbed.

The statement in the brief of the city counselor that during the life of the complainant's franchise there would be a total saving of $10,000,000.00 in fares, is ridiculously extravagant.

Counsel on the other side attach undue importance to the word exclusive as used in the ordinance.

It is obvious that the construction of a street railway track and the running of cars thereon in a street of ordinary width is largely exclusive in fact even where the right of way is not so made in terms.

Street railway tracks differ materially in this respect from gas pipes or telegraph or telephone lines. Different companies may lay gas pipes in the same streets without any permanent or even long continued interruption of public travel in the street. So several telegraph or telephone companies may string their wires overhead or through underground conduits with but temporary inconvenience to the public use of the street. But usually the occupation of a street by one street railway company physically excludes from that street the track of another street railway. And when the first company's right of way is for a double track, it does so necessarily; for the city cannot interfere with the rights of the public in the street by multiplying street railway tracks.

St. Ry. Companies' Case, 48 Mich., 433.
Railway Co. vs. Mills, 85 Mich., 634.
People vs. St. Ry. Co., 92 Mich., 522.

It is evident therefore that the objections to an exclusive grant for a street railway are more technical than real.

Much stress is laid by counsel upon the canons of interpretation of statutes which are found in the books. It is said that grants of this nature are to be construed strictly in favor of the public and against the corporations. As to this, we understand the rule applicable to this case to be that enunciated in

Oregon Ry Co. vs. Oregonian Ry. Co., 130 U. S., p. 26,

that as regards the extent of the grant the universal rule is "t h a t i n d o u b t f u l p o i n t s the construc-

tion shall be against the grantee and in favor of the government or general public."

But all rules of construction are framed only as means of arriving at the true intent of the act in question. The paramount consideration is that the intent of the Legislature shall govern.

This is clearly stated by Lurton, J., in Detroit Citizens' St. Ry. vs. Detroit, 12 C. C. A., 365, at p. 376 (construing these same laws):

"But the books abound in rules of construction. They all have one end in view, and that is to ascertain and declare the intent of the act under construction. Contrasting the rule which requires a strict construction of penal statutes with the rule requiring that the intent of the Legislature shall govern, Chief Justice Marshall, in U. S. vs. Wiltberger, 5 Wheat., 95, as to the rule of intent, said:

"'It is a modification of the ancient maxim and amounts to this: that though penal statutes are to be strictly construed they are not to be construed so as to defeat the obvious intention of the Legislature.'"

"In U. S. vs. Hartwell, 6 Wall., 395, the Court, in speaking of this strict rule of construction of certain classes of statutes, said of the rule that:

"Wherever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the Court is to be made up. The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must be narrowed to the exclusion of what the Legislature intended to embrace, but that intention must be gathered from the words, and they must be such as to leave no room for a

reasonable doubt upon the subject. It must not be defeated by a forced and over strict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the Legislature ought not to be presumed to have intended. * * * The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the Legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning or the more extended of two meanings, as the wider popular, instead of the narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

In the case before us "that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the Legislature" is such power of consent as will fully and best enable the city to provide for its citizens a well planned system of street railways.

Construing these same laws the United States Circuit Court of Appeals for the Sixth Circuit (Mr. Justice Jackson and Lurton and Sage, JJ.) held, in Detroit Citizens' St. Ry. Co. vs. Detroit, 12 C. C. A., 365, at p. 382:

"We are thus led to conclude that these street railway acts directly confer upon the municipality of the State power to grant to street railway companies such an easement of way in the streets as is requisite for the purposes to be accomplished. That power is conferred without and express words of limitation. On the contrary, the 'terms and conditions' upon which the grant is to be made are left to the discretion of the local government."

The only easement of way requisite for the purposes to be accomplished is one which will authorize the adoption by the city of a proper street railway system adequate and suitable for future and growing needs as well as those immediately present. As has been shown, the City of Detroit, in the ordinance in question, wisely planned and adopted such a system of street railways, and in so doing acted wholly within its powers.

III.

Even if the exclusive privileges given by the ordinance are held void, the remainder of the ordinance would not necessarily be invalid.

This is expressly held by the Supreme Court of Michigan in

People vs. Street Ry. Co., 92 Mich., 522

If, therefore, the city had the power to adopt a system of street railways and provide for extensions and new routes thereof, but had not the power to give the exclusive use of the streets comprised therein, this complainant would still be entitled to the first right to build and operate the extensions and new routes in connection with and as part of the original system, and to that extent should be granted the relief prayed for in its bill of complaint.

I submit that upon the correct rules of construction applicable to this case, and upon every principle of fairness and good faith, the decision of the Supreme Court of the State of Michigan should be reversed and the complainant should be granted the relief prayed in its bill.

HENRY M. DUFFIELD,
Counsel for Plaintiff in Error.

No. 236.

Sup. Br. of Baker for P. E.

Filed May 9, 1898.

FILED
MAY 9 1
JAMES H. McKEN

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE DETROIT RAILWAY and THE CITY OF DETROIT,
Defendants in Error.

No. 236.

SUPPLEMENTARY STATEMENT FOR PLAINTIFF IN ERROR.

An ordinance of the Common Council of the City of Detroit, approved November 24, 1862, was amended by an ordinance approved December 27, 1862, and by an ordinance approved January 12, 1863. The grantees named in the ordinance thereupon accepted it by organizing the "Detroit City Railway," and making the required deposit of $5,000.

Record, pp. 11-16.

An examination of sections 2, 5 and 6, of the ordinance as so amended and accepted, shows that street railway routes were specifically granted by it as follows:

FIRST ROUTE.

The whole length of Woodward avenue, from the Detroit River to the northerly limits of the city. A part of Woodward avenue north of the Grand Circus had been known as Witherell street, and therefore mention was made of that street.

SECOND ROUTE.

The whole length of Jefferson avenue, from the easterly limits of the city to the intersection of said avenue with Woodbridge street, near First street; thence along Woodbridge street to Third street; up Third street to Fort street, and on Fort street to the western limits of the city.

THIRD ROUTE.

The whole length of Gratiot avenue, from the intersection of said avenue with Randolph street to the easterly limits of the city; along State street to Woodward avenue, or along Randolph street and Monroe avenue to the Campus Martius and Woodward avenue.

FOURTH ROUTE.

The whole length of Grand River avenue, from Woodward avenue to the northwesterly limits of the city.

FIFTH ROUTE.

The whole length of Michigan avenue, from Woodward avenue to the westerly limits of the city.

SIXTH ROUTE.

The whole length of Brush street (or of Beaubien street), from Atwater street to the northerly limits of the city.

SERVICE REQUIRED TO CORNER OF JEFFERSON AND WOODWARD AVENUES.

In 1862, and for many years afterwards, the business center of the city was at these corners. This explains why it was expressly stipulated in the ordinance—

"That the railways on Grand River street, Gratiot street, and Michigan avenue shall each run into and connect with the Woodward avenue railways in such direction that said railways shall be continued down to, and form, each of them, one continuous route to Jefferson avenue." Sec. 2.

Record, p. 12.

Some idea of the relative importance of the several routes can be obtained from the stipulations as to the periods of time within which they should be built and completed.

WITHIN SIX MONTHS.

(1) The Woodward avenue line, as far north as Park lot 62, which is in the vicinity of Alexandrine avenue. This was only about half of that part of the avenue in the city.

(2) The Jefferson avenue, Woodbridge street, Third street, and Fort street line, from the eastern to the western limits of the city.

WITHIN TWO YEARS.

The Michigan avenue line from Woodward avenue to Thompson street, now Twelfth street.

WITHIN THREE YEARS.

The Gratiot avenue line, from Woodward avenue to the B. Chapoton farm, now McDougall avenue.

WHEN THE PUBLIC CONVENIENCE REQUIRES.

The clause or provision fixing the periods in which the different routes should be constructed concludes with these words:

"And the remainder thereof at such times *as the public convenience may require.*"

ORDINANCE OF AUGUST 19, 1863.

While the construction of the roads was in progress, and before the first six months had expired, the Common Council passed the ordinance approved August 19, 1863, which provides:

(1) That in stead and in lieu of the construction within the six months on Third and Fort streets, the company should construct its roads on Michigan avenue, from Woodward avenue to Fourth street, and on Gratiot avenue, from Woodward avenue to Russell street.

(2) That the company should complete its roads "on Fort street, Michigan avenue and Gratiot street, as provided by the aforesaid ordinances, by the first day of October, 1864, and a failure to complete the same by that time shall be regarded as a forfeiture of the route or routes not so completed."

(3) That the Jefferson avenue, Woodward avenue, Michigan avenue, and Gratiot street lines should each be considered one route; that all cars running north of Jefferson avenue should run to and from Jefferson avenue; and "that portion of Woodward avenue between Jefferson avenue and the routes intersecting Woodward avenue" should "be considered as making a portion of each of said routes respectively."

Record, pp. 16-17; 205-206.

ORDINANCE OF JANUARY 4, 1864.

This ordinance severed the proposed Fort street line from the Jefferson avenue line by cutting out their connection through Third street; and it authorized the construction of a line on Fort street from Woodward avenue to Stanton street (Seventeenth street), and west of Stanton street the road was to be constructed down Stanton street and along River street to the westerly limits of the city, instead of Fort street.

It was further provided that—

"The road and track of said railway from said westerly limits through said River Road, Stanton street, and Fort street, and from Fort street along Woodward avenue to Jefferson avenue, shall then form one route, along which said railway shall run its cars continuously, and on which it shall be entitled to receive one fare for each passenger."

Record, pp. 206-207.

We thus see that upon all the routes actually designated and fixed by the ordinance of November 24, 1862, as amended, the Common Council took especial pains to have the cars all run to the corner of Jefferson and Woodward avenues, and that the lines lying north of Jefferson avenue were all required to run into Woodward avenue at or near the Campus Martius, and from thence down Woodward avenue to Jefferson avenue.

The ordinance, as amended, provided for the establishment of a central street railway system, which was to occupy the principal streets of the city. Street railways were to be presently constructed along these streets a sufficient distance out from the business center of the city to accommodate the public, and they were to be thereafter extended further out along these streets as the public

convenience, from time to time, might require. Other routes, to be constructed in the future, would naturally run into the central system so established, and become a part of it, and with that object in view it was provided in section 2 of the ordinance, as amended, that the company, in addition to the routes specifically named, was also authorized to construct street railways—

"Through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of the City of Detroit, and assented to in writing by said corporation organized as provided in section first of this ordinance: and provided the corporation does not assent in writing within thirty days after the passage of said resolution of the Council ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid, at their own cost and expense."

The foregoing is the provision of the ordinance in question in this case. A careful analysis of it shows:

FIRST.

That it did not grant to the Detroit City Railway all the other streets of the city, or give the company any present rights therein, but left it to the discretion of the Common Council to subsequently, from time to time, determine what new routes of street railway should be constructed in the city. This left it in the power of the Common Council to refuse any or all new routes until the company should agree to such modifications of the ordinance with reference to either the old or the new routes as the city might desire.

SECOND.

That the city could not grant a new route to any other company unless it first offered the same on the terms and conditions of the ordinance of November 24, 1862, as amended, to the Detroit City Railway, and that company had refused within thirty days to accept it.

In considering these features of the ordinance we must keep in view the respective interests of the two parties to the contract and their natural attitude towards the construction of new routes. (1) It is plain that the city would frequently, if not uniformly, desire to have a new route constructed before there was patronage enough tributary to it to support it. (2) It is equally plain that the street railway company would not desire to construct a new route until it was satisfied that soon after it was constructed it would pay for its operation on the terms, conditions and rates of fare fixed by the ordinance, and that as soon as any new route would be remunerative, either as an independent route, or as a feeder to an old route, the company would desire to construct it.

So far as the company could be induced to build and operate new routes as additions to the central system, the public service would be more effectively improved than by the construction of new routes by new companies, and as the Detroit City Railway would be willing to build a new route as soon as it would be remunerative on the terms and rates of fare of the ordinance of November 24, 1862, the chance for extensions of the system by the construction of new routes was much greater with the old company than with any new one that might be organized.

In any case, where the city wanted a road prematurely constructed, that is, before it would pay, all the city had to do was to offer the route to the Detroit City Railway,

and that company was obliged to accept it, or lose it forever.

The City of Detroit was more interested in having the company accept a route than in rejecting it, for in that way it would obtain the better system and service. This is well illustrated by some of the routes granted to the Detroit Railway by the ordinance of December 4, 1894, which led to this controversy.

The Fourteenth street line of the Detroit Railway, between Michigan avenue and Grand River avenue, comes within a block of Michigan avenue, and the cars on that route should be run down Michigan avenue to the Campus Martius and Woodward avenue.

The Fourteenth street route north of Grand River should run down Grand River avenue to Woodward avenue, and down Woodward avenue to the Campus Martius and Jefferson avenue.

The Hastings and Beaubien street lines of the Detroit Railway come within a short distance of Gratiot avenue, and should run down Gratiot and Monroe avenues to the Campus Martius and Woodward avenue; and the Clinton, Sherman and Macomb street lines should do the same.

The Mt. Elliott avenue line of the Detroit Railway, north of Gratiot avenue, should also run down Gratiot avenue.

The Warren avenue, Bagg and Locust street lines, west of Grand River avenue, should run down Grand River avenue to Woodward avenue and the Campus Martius.

The great object of the city in making the grant was to secure a central and main street railway system and to provide for its continuous growth and enlargement. Section 2 was inserted for the benefit that would arise to the city therefrom, and as a protection to the capital to be invested in the central system. It was both wise and just, and the city had the full benefit of it without inter-

ruption from 1863 to 1894, a period of over thirty years. There is no good reason why it should now be permitted to repudiate the bargain that was so advantageous to it, and was one of the means by which the population of the city was increased from 50,000 to over 250,000 people.

COMMENTS ON MINTURN VS. LARUE. 23 HOW., 435.

In that case it appeared that the charter of 1852 of the town (now city) of Oakland conferred power on the Board of Trustees "to make such by-laws and ordinances as they may deem proper and necessary," among other things, "to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries," etc., "wharves, docks, piers, slips," etc., "and to authorize the construction of the same."

Held, that this provision did not authorize the Board of Trustees to grant an exclusive right of ferries between Oakland and San Francisco.

The Court, in an opinion by Mr. Justice Nelson, applied the rule of strict construction to this grant of power, but stated the following very clear and important distinction, which is the very essence of the point or proposition on which the plaintiff in error in the case at bar relies:

"It must be remembered that this is not the case where the Crown or Legislature had aliened to a municipal corporation its whole power to establish and regulate ferries within its limits, as may be found in some of the ancient charters of cities in England and in this country. In those cases the municipal body in respect to this legislative or public trust represents the sovereign power, and may make grants of ferry rights in as ample a manner as the sovereign.

"The error, we think, in the argument of the appellant is, in confounding this grant with these ancient charters

or those of a like charter. But on referring to them it will be seen that the form of the grant is very different and much more particular and comprehensive, leaving no doubt as to the extent of the power."

As a sample of the kind of cases referred to, the Court cites *Costar vs. Brush, 25 Wend., 628*, in which the opinion was delivered by Judge Nelson as Chief Justice of the State of New York, with the approval of his associates on the bench, Green C. Bronson and Esek Cowen.

The corporation of the City of New York, January 24, 1814, granted by a lease to Robert Fulton and William Cutting, the right to establish a ferry between Beekman slip in New York City and the old ferry at Brooklyn (now called the Fulton ferry) for twenty-five years from the first day of May ensuing the date of the lease. The city covenanted that it would not during the existence of the lease, grant establish or permit any other ferry between the City of New York and Brooklyn to the *southward* of the then ferry at Catherine slip.

The question whether the corporation of the City of New York in entering into the restrictive or exclusive clause in the lease did not exceed its power, was disposed of by the Court as follows:

"It is also insisted that the grant of the right of establishing ferries made to the corporation of the city was a franchise, to be exercised for the public good, and that any restriction consented to or imposed upon itself in the exercise of the power was illegal," etc.

"The short answer to all which is that the corporation of the city possessed the same power in respect to the establishment of ferries across the East River, that before belonged to the Crown or the Legislature, and the exclusive privileges, therefore, extended to the lessees of the Fulton ferry were within its municipal authority, and binding both upon the city and the public. See City

Charter, Sec. 15, and Kent's Notes, pp. 56-7, and 139-142 inclusive; 6 Wend., 85; 11 Peters, 540."

The charter provision referred to is to be found in the city charter granted in 1730 in the name of George II., by John Montgomerie as Captain General and Governor in Chief of the Province of New York. The provision in question reads as follows:

"And we do, for us, our heirs and successors, give, grant and confirm unto the Mayor, Aldermen and commonalty of the said City of New York and their successors forever, that the council of the said city, for the time being, or the major part of them (but no other person or persons whomsoever, without the consent, grant or license of the said Common Council of said city for the time being, or the major part of them), from time to time and all times hereafter shall and may have the sole, full and whole power and authority of settling, appointing, establishing, ordering and directing, and shall and may settle, appoint, establish, order and direct, such and so many ferries, around Manhattan's Island, alias New York Island, for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan to Nassau Island, and from thence back to Manhattan's, and also from said Island Manhattan to any of the opposite shores all around the same island, in such and so many places as the said Common Council or the major part of them shall think fit, who have hereby likewise full power to let, act, or otherwise dispose of, all or any of such ferries, to any person or persons whomsoever; and the rents, issues, profits, ferriages, fees, and other advantages arising and occurring from all and every such ferries; we do hereby fully and freely, for us, our heirs and successors, give and grant unto the Mayor, Aldermen and commonalty of the City of New York aforesaid, and to their successors forever, to have, take hold and enjoy the same, to their own

use, without being accountable to us, our heirs or successors for the same or any part thereof."

The charter of 1730 recites in full the prior charter granted in the name of James II. by Governor Thomas Dongan, in 1686, and also the grant relative to ferries made by Anne in 1708.

Charter of New York, and Kent's Notes, pp. 4-26.

The charter of 1686, in its preamble, states that "the City of New York is an ancient city," etc., and that the citizens and inhabitants of said city "have established and settled one ferry from said City of New York to Long Island for the accommodation and conveniency of passengers, the said citizens and travelers."

This charter confers "full power, license and authority to the said Mayor, Aldermen and commonalty, and their successors forever, to establish, appoint, order and direct the establishing, making, laying out, ordering, amending and repairing of all streets, lanes, alleys, highways, water courses, ferry and bridges in and throughout the said City of New York and Manhattan's Island aforesaid, necessary, needful and convenient for the inhabitants of said city and Manhattan's Island aforesaid, and for all travelers and passengers there."

Id., pp. 3-4, 6-7.

The charter of 1730 contains a grant by the Crown to the city of "the ferry and ferries on both sides of the East River, and all other ferries now and hereafter to be erected and established all around the Island of Manhattan's, and the management and rule of, and all fees, ferriages and perquisites of the same or any part thereof, belonging or to belong; and also the ferry houses on Nassau Island, with the barns, stables, pens or pounds and lot of ground thereto belonging," etc., "and to make laws and

rules for the governing and well ordering of all ferries now erected or established or hereafter to be erected or established around the said Island Manhattan's."

Id., pp. 84-85.

Chancellor Kent, in his notes, expresses the opinion that the grant of the right to establish other ferries and to appropriate the profits was a grant of property and not a grant of sovereign legislative power of a public legislative character liable to be recalled at the pleasure of the Legislature.

Id., pp. 140-141.

The charter of 1730 was approved by the Attorney General and granted by the Governor, January 15, 1730, but it was confirmed by an act of the Governor, Council and General Assembly of the Colony of New York, October 14, 1732. It remained in force without amendment until 1830.

The foregoing matter was used by the undersigned in his oral argument.

It is printed for the convenience of the Court in examining the cases of Minturn vs. Larue, and Costar vs. Brush.

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